

Supreme Court, U.S.

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No. 93-1456 and 93-1828

In the Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, ET AL.,
Petitioners

v.

RAY THORNTON, ET AL.,
Respondents

STATE OF ARKANSAS EX REL. WINSTON BRYANT,
ATTORNEY GENERAL OF THE STATE OF ARKANSAS,
Petitioner

v.

BOBBIE E. HILL, ET AL.,
Respondents

On Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF FOR HENRY J. HYDE AS
AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Amicus will address the following question:

Whether it is consistent with the intent of the Framers for a state to add to those qualifications for service in Congress that are expressly prescribed in the Constitution.

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BRIEF FOR HENRY J. HYDE AS
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INTEREST OF THE AMICUS CURIAE

Amicus Henry J. Hyde represents the Sixth Congressional District of Illinois in the United States House of Representatives. He has served in the House since 1975, is chair of the House Republican Policy Committee, and is the Ranking Minority Member of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee.

Representative Hyde believes that the United States Constitution sets forth the exclusive qualifications for service

in Congress and that the states may neither add to the list of qualifications nor adopt measures that have the practical effect of precluding the election of particular classes of constitutionally qualified candidates. He has an interest in assuring that the intent of the Framers of the Constitution is carried out and that the choice of candidates for Congress available to the voters of each congressional district is not unconstitutionally limited. He also has a compelling interest, as a Member of the House of Representatives, in preserving the effectiveness of Representatives and Senators by precluding the imposition of arbitrary limits on their tenure.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' arguments are premised on a fundamental misconception of constitutional history. They maintain that the Constitution does not specifically preclude the states from adding to those qualifications for service in Congress that are stated in the constitutional text. In fact, however, the Framers had firmly in mind — and constructed the Constitution upon — two principles of democratic theory that are wholly incompatible with the state power contended for by petitioners.

First, the Framers believed that the right of the electorate to select the candidates of its choice was a fundamental aspect of liberty. That point was settled as a matter of English constitutional law by the notorious Wilkes case in the years immediately preceding the Constitutional Convention. And the principal Framers, including Madison, Hamilton, John Adams, and Robert Livingston, stated repeatedly and emphatically that the qualifications for service in Congress should be kept to a minimum and should be unalterably stated in the Constitution. Indeed, they regarded restrictions on the

electorate's ability to choose representatives as, in Adams' words, "a violation of the rights of mankind." Term limits — or any other restrictions on eligibility for service in Congress — imposed by the states plainly are incompatible with this principle.

Second, the Framers understood the essential guarantee of democracy to be, not limits on congressional tenure imposed by the states, but frequent elections. The prospect of having to face the electorate, it was believed, would keep members of Congress loyal to their constituents. On this view, the imposition of term limits by the states, which would remove the incentive for what Madison called "a faithful discharge of their trust" from members of Congress, would be positively inimical to the theory on which representatives were to be kept responsive to the people.

In this light, it is hardly surprising that all participants in the ratification debate understood the Constitution to state the *exclusive* qualifications for service in Congress. In particular, anti-federalist opponents of ratification understood term limits to be *wholly* excluded by the constitutional plan; federalist supporters of ratification declared it a great *virtue* of the Constitution that it guaranteed the people the right to vote for whomever they chose. Madison made that point clear in *The Federalist*, where he declared that service in Congress was open to all, while Hamilton agreed that the qualifications for service were "defined and fixed in the constitution." And this understanding was confirmed in the first generation after ratification, when the House disregarded a state's attempt to add to the constitutional qualifications for service in that chamber. The history therefore is decisive: the states cannot impose extra-constitutional requirements for service in Congress.

ARGUMENT

Petitioners devote remarkably little attention to what should be the dispositive consideration in this case: the intent

¹ The parties' letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3 of the Rules of this Court.

of the Constitution's Framers regarding the authority of the states to add to the qualifications for service in Congress that are set out in the Constitution. In fact, that intent was plain. The pre-constitutional history, the debates at the Convention and over ratification, the explicitly stated views of the principal Framers, and other indicia of the contemporary understanding make clear that the Constitution accepted as fundamental the premise that the people have the right to elect the senators and representatives of their choice. Against this background, the Framers would have been shocked at the suggestion that the states are free to determine who is eligible to serve in the national Congress. Arkansas' term limits provision cannot be squared with this understanding.

A. Pre-Constitutional History

1. The scene was set for the Convention's consideration of Article I, § 2, by the case of John Wilkes, which this Court has described as "the most notorious English election dispute of the 18th century" (*Powell v. McCormack*, 395 U.S. 486, 527 (1969)) — and one that petitioners wholly ignore. In 1763 Wilkes, then serving in the House of Commons, published a scathing criticism of the Crown for concluding a peace treaty with France, contending that it was the product of bribery. See H. Postgate, *That Devil Wilkes* 53 (1929). Wilkes was promptly arrested and, prior to trial, was expelled from the House. He subsequently fled (ironically) to France. See 9 L. Gipson, *The British Empire Before the American Revolution* 37 (1956); Eid & Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 U. Denv. L. Rev. 1, 28 (1992).

Wilkes returned to England in 1768, the year in which the Parliament from which he had been expelled was dissolved, and was elected to the next Parliament. Before he could begin service, however, he was convicted of seditious libel and sentenced to 22 months' imprisonment. See *Powell*,

395 U.S. at 527-528. When Wilkes was proposed ineligible for membership in the House, it was argued in his behalf:

*That the right of electors to be represented by men of their own choice, was so essential to the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our constitution. * * * That the law of the land had regulated the qualifications of members to serve in parliament, and that the freeholders * * * had an indisputable right to return whom they thought proper, provided he was not disqualified by any of those known laws. * * * [Those laws] are not occasional but fixed: to rule and govern the question as it shall arise; not to start up on a sudden, and shift from side to side, as the caprice of the day and the fluctuation of the party shall direct.*

16 Parl. Hist. Eng. 589-590 (1769) (emphasis added), quoted in *Powell*, 395 U.S. at 543 n.65.

Wilkes nevertheless was declared ineligible and was expelled from the House. 16 Parl. Hist. Eng. 545 (1769). He subsequently was re-elected three times to fill the vacant seat, but was pronounced ineligible to serve on each occasion. See *Powell*, 395 U.S. at 528. He was elected yet again in 1774 and began a lengthy campaign to have the resolutions declaring him ineligible to serve expunged from the record; he finally succeeded in 1782, when the House of Commons resolved that its prior treatment of Wilkes was "subversive of the whole body of electors of this kingdom." 22 Parl. Hist. Eng. 1411 (1782), quoted in *Powell*, 395 U.S. at 528.

The Wilkes episode was widely followed in the American colonies and was, it appears, cited by Madison at the Constitutional Convention. See C. Warren, *The Making of the Constitution* 420 n.1 (1929); *Powell*, 395 U.S. at 535-536 n.68. The Court has noted that

Wilkes' struggle and his ultimate victory had a significant impact in the American colonies. His advocacy of libertarian causes and his pursuit of the right to be seated in Parliament became a *cause célèbre* for the colonists. “[T]he cry of ‘Wilkes and Liberty’ echoed loudly over the Atlantic Ocean as wide publicity was given to every step of Wilkes’ public career in the colonial press. . . . The reaction in America took on significant proportions. Colonials tended to identify their cause with that of Wilkes. They saw him as a popular hero and a martyr to the struggle for liberty. . . . They named towns, counties, and even children in his honour.”

Id. at 530-531, quoting 11 Gipson, *supra*, at 222. See also *id.* at 531 n.60; Postgate, *supra*, at 171-174.

As the Court has explained, “[i]t is within this historical context that [it] must examine the Convention debates in 1787, just five years after Wilkes’ final victory.” *Powell*, 395 U.S. at 531. And the principle to be derived from the Wilkes episode is clear. Wilkes’ victory makes plain, of course, that the legislature should not have a free hand in setting the qualifications of its own members. See *id.* at 528-529. But more broadly, the Wilkes affair established “the right of the British electorate to be represented by men of their own choice.” *Id.* at 528. It thus “is evident that, on the eve of the Constitutional Convention, English precedent stood for the proposition that ‘the law of the land had regulated the qualifications of members to serve in Parliament’ and that those qualifications were ‘not occasional but fixed.’” *Ibid.*, quoting 16 Parl. Hist. Eng. 589, 590 (1769). In this setting, the Framers plainly came to the Constitutional Convention with the view that limits on the qualifications of those who would serve in Congress should be permanently set by the Nation’s fundamental law — and that the people should not be deprived of the “essential” and “sacred” right to choose the representatives of their choice.

2. At the same time, the 1780s saw increasing dissatisfaction with the use of term limits as a safeguard of liberty. Many states had adopted term limits — particularly for the executive — as part of the Radical Whig reforms of the 1770s. Thus, seven of the ten new state constitutions drafted in 1776-1777 limited the number of years the chief magistrate could successively hold office. See G. Wood, *The Creation of the American Republic, 1776-1787*, at 140 (1969).² Only two states, however, limited the service of legislators; Pennsylvania, the center of radical reform during the period, limited the tenure of all state officials (see *id.* at 140 n.26; F. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 3084 (1909)), while Virginia imposed term limits on its state senators. See Otteson, *A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution*, 41 Depaul L. Rev. 1, 8 n.38 (1991). In addition, the Articles of Confederation limited the terms of delegates to the Confederation Congress to “no more than three years, in any term of six years” (Art. Confed. Art. V, § 2 (1778)), and four states (Maryland, New Hampshire, Pennsylvania, and Vermont) imposed additional limits on the terms of their delegates to the Confederation Congress. See Note, *Congressional Term Limits: Unconstitutional by Initiative*, 67 Wash. L. Rev. 414, 417 (1992).

During the 1780s, however, the perceived inadequacies of the state and Confederation governments prompted growing dissatisfaction with term limits. See Wood, *supra*, at 399, 436. Massachusetts thus considered but rejected a term limits provision in its 1780 constitution. See *ibid.* See also *Opinion of the Justices to the Senate*, 595 N.E.2d 292, 298-

² The seven were Delaware, Georgia, Maryland, North Carolina, Pennsylvania, South Carolina, and Virginia.

301 (Mass. 1992); E. Douglas, *Rebels and Democrats* 187-214 (1955). Pennsylvania's Council of Censors, acting in the home of radical Whiggism, proposed repeal of the Commonwealth's term limits in 1784 because "the privilege of people in elections, is so far infringed as they are thereby deprived of the right of choosing those persons whom they would prefer." Wood, *supra*, at 439 (citation omitted). And it appears that the term limits in the Articles of Confederation led to the loss of almost the entire Rhode Island delegation to the Confederation Congress in 1784, an episode that may have led many of the Framers to doubt the wisdom of limiting legislative terms. See Note, *Constitutionality of Term Limitations: Can States Limit the Terms of Members of Congress?*, 23 Pac. L.J. 1677, 1679-1680 (1992).

B. The Constitutional Convention and Ratification

1. Against this background, it is no surprise that the Convention voted *unanimously* to remove the congressional term limits that had been a part of the Virginia Plan. 1 *The Records of the Federal Convention of 1787*, at 217 (M. Farrand ed. 1966) (hereinafter "Farrand"). The Convention debates are addressed in detail by respondents and in Powell (395 U.S. at 532-536), and will not be repeated here. But one point bears emphasis. Responding to the proposal that Congress be given the authority to add qualifications to those specified in the Constitution, Madison declared that such an approach would vest "an improper & dangerous power in the Legislature" both for functional reasons and because of the essential principle that "[t]he qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution." *Farrand* at 249-250. That argument, which bears a "striking" similarity to "those made in Wilkes' behalf" (Powell, 395 U.S. at 534), plainly does not admit the possibility that the constitutionally specified qualifications may be "unfixed" by the states.

2. That the Constitution was understood to preclude states from adding to the qualifications specified in the text is made clear beyond peradventure by the ratification debates. Petitioner USTL finds it notable that opponents of the Constitution did not in terms suggest that states were denied the power to set the qualifications for service. Br. 42. In fact, however, anti-federalist opponents of the Constitution argued repeatedly and vehemently that "[r]otation in office, a 'truly republican institution,' had been abandoned [by the Constitution], making the Senate, some feared, 'a fixed and unchangeable body of men' and the president 'a king for life, like a king of Poland.'" Wood, *supra*, at 521 (citations omitted). The issue was debated repeatedly and at length, and the terms of the debate were clear: opponents of the Constitution believed that term limits — whatever their source — were wholly excluded by the constitutional plan; the Constitution's supporters replied that fundamental democratic principles properly precluded any attempt to bar voters from selecting the representatives of their choice.

Thus William Findley, a leading opponent of the Constitution, urged rejection of the document — in a tract that was widely reprinted in newspapers and was republished both as a broadside and as a short pamphlet (3 *The Complete Anti-Federalist* 91 (H. Storing ed. 1981)) — because (among other things) "ROTATION, that noble prerogative of liberty, is *entirely excluded from the new system of government* and the great men may and probably will be continued in office during their lives." *Letter of an Officer of the Late Continental Army, Nov. 6, 1787* (emphasis added), in *id.*, § 3.8.3, at 94. See also S. Bryan, *Letters of Centinel, Oct. 5, 1787*, in *Anti-Federalists Versus Federalists: Selected Documents* 139-141 (J. Lewis ed. 1967) (same). Elbridge Gerry, a prominent anti-federalist who had attended the Convention, argued that absent term limits in the Constitution itself, inevitably there would be "the perpetuity of office in

the same hands for life." E. Gerry, *Replies to the Strictures of 'A Landlord'* (1787), in *id.* at 199.

Many others offered similar objections. The essays of Brutus, "among the most important Anti-Federalist writings" which "were widely reprinted and referred to" (2 *Complete Anti-Federalist* 358), complained that "[i]t is probable that senators once chosen for a state will, as the system now stands, continue in office for life." *Id.*, § 2.9.201, at 244. Opponents of the Constitution in Pennsylvania, decrying the absence of term limits, declared that "[t]he permanency of the appointments of senators and representatives, and the control the congress have over their election, will place them independent of the sentiments and resentment of the people." *The Address and Reasons of the Dissent of the Minority of the Convention of Pennsylvania to Their Constituents, Dec. 18, 1787*, in 3 *Complete Anti-Federalist*, § 3.11.48, at 163. These dissenters added that, so far as preventing abuse of power by Congress was concerned, "*there is no controul left in the state governments*, whose intervention is destroyed." *Id.*, § 3.11.48 (emphasis added). Other critics, like the Federal Farmer — whose writings were "one of the ablest Anti-Federalist pieces" and were "widely known and respected" (2 *Complete Anti-Federalist* 214, 216) — maintained that the omission of term limits from the Constitution would lead Congress "to become in some measure a fixed body, and often inattentive to the public good, callous, selfish, and the fountain of corruption." *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention: And to Several Essential and Necessary Alterations in It. In a Number of Letters from the Federal Farmer to the Republican*, 1787, in *id.*, § 2.18.147, at 290-291.

These arguments, of course, would have been nonsensical if the transformation of Congress into an "aristocratic tyranny" (Wood, *supra*, at 520 (citation omitted)) could have been avoided by the simple expedient of state-imposed term

limits. And it is telling that none of the defenders of the Constitution responded that states *could* require rotation in office or add other qualifications to the Constitution's list. To the contrary, they insisted that it was a great *virtue* of the Constitution that it guaranteed the people the right to vote for whomever they chose.

John Adams, for example, argued expressly that term limits were properly prohibited by the Constitution, grounding his view squarely on the democratic theory that the electorate had a fundamental, natural law right to select the representatives of their choice. He explained:

rotation * * * is a violation of the rights of mankind; it is an abridgement of the rights both of electors and candidates. There is no right clearer, and few of more importance, than that the people should be at liberty to choose the ablest and best men, and that men of the greatest merit should exercise the most important employments[.]

6 *Works of John Adams* 52-53 (Charles F. Adams ed. 1851). This argument, which again echoed the defense of Wilkes before Parliament, plainly understood the qualifications stated in the Constitution to be the fundamental law of the land that could not be modified in any respect, without constitutional amendment.

Others made identical arguments. Speaking to the New York ratification convention, Robert Livingston placed his defense of the Constitution's preclusion of term limits on grounds of both democratic theory and utility:

The people are the best judges [of] who ought to represent them. *To dictate and control them, to tell them who they shall not elect, is to abridge their natural rights.* This rotation is an absurd species of ostracism — a mode of proscribing eminent merit, and banishing from stations of trust those who have

filled them with the greatest faithfulness. Besides, it takes away the strongest stimulus to public virtue — the hope of honors and rewards. The acquisition of abilities is hardly worth the trouble, unless one is to enjoy the satisfaction of employing them for the good of one's country. We all know that experience is indispensably necessary to good government. Shall we, then, drive experience into obscurity? *I repeat that this is an absolute abridgement of the people's rights.*

² *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 292-293 (J. Elliot 2d ed. 1836) (hereinafter “*Elliot’s Debates*”).

Hamilton made a similar practical argument to the New York convention:

[I]n contending for a rotation, the gentlemen carry their zeal beyond all reasonable bounds. I am convinced that no government, founded on this feeble principle, can operate well[.] * * * The gentlemen deceive themselves; the amendment would defeat their own design. When a man knows he must quit his station, let his merit be what it may, he will turn his attention chiefly to his own emolument: nay, he will feel temptations, which few other situations furnish, to perpetuate his power by unconstitutional usurpations. Men will pursue their interests. It is as easy to change human nature as to oppose the strong current of the selfish passions.

² *Elliot’s Debates* 320.³ Again, this argument that the

³ Hamilton and Livingston were responding to a proposal that the text of the Constitution be changed to impose term limits for senators; similar proposals as to all members of Congress were made by the North Carolina and Virginia ratifying conventions.

federal government would be rendered “feeble” by term limits plainly was understood to preclude restrictions imposed by the states — and, indeed, to preclude *especially* limits imposed by the states, which might be jealous of the national government’s authority. This was a point to which Hamilton returned in *The Federalist*.

3. Indeed, any doubt that the qualifications stated in the Constitution were regarded as immutable is dispelled by *The Federalist*. At the outset, as respondents observe, Madison wrote unequivocally of the House of Representatives:

The qualifications of the elected being less carefully and properly defined by the State Constitutions [than those of the electors], and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the Convention. * * * Under these reasonable limitations, the door of this part of the Federal Government, is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.

The Federalist No. 52, at 266-267 (Bantam ed. 1988).

Madison returned to the point when he refuted the assertion that the House would become an “oligarchy” (*The Federalist* No. 57, at 289), explaining:

See 1 *Elliot’s Debates* 330 (New York); 4 *Elliot’s Debates* 243 (North Carolina); 3 *Elliot’s Debates* 657-658 (Virginia). It is notable that neither the proponents nor the opponents of these amendments so much as suggested that states could accomplish the same result as to their own representatives and senators through action of the state legislature. As respondents note, the First Congress rejected a constitutional amendment that would have limited the terms of representatives. 1 *Annals of Cong.* 790 (1789).

Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people.

Id. at 290. Hamilton agreed, writing that “[t]he qualifications of the persons who may choose or be chosen, as has been remarked upon [on] another occasion, are defined and fixed in the constitution; and are unalterable by the legislature.” *The Federalist* No. 60, at 308. These propositions, premised on the theory that anyone would be permitted to serve in the House so long as he (only male representation was envisioned, of course) met the constitutionally prescribed qualifications, cannot be squared with the exclusion of a class of candidates by the states.

Petitioner USTL (at Br. 43-44) maintains that Hamilton in this latter statement (and Madison in his similar declaration to the Convention) “could not have been denying state power” because “in each instance when Madison and Hamilton referred to qualifications being ‘fixed’ by the Constitution, they referred in the very same sentence to the qualifications of *voters* (electors) as well as members of Congress”; Article I, § 2, cl. 1, USTL continues, “left the qualifications of *voters* entirely up to the legislature of each State.” But this contention is wrong, because Hamilton and Madison plainly *did* regard the qualifications of electors as “fixed” even so far as the states are concerned. In making his statement, Hamilton observed that the unalterable nature of the qualifications of both the electors and the elected “has been remarked upon [on] another occasion.” He had in mind *The Federalist* No. 52, where Madison expressly referred to “the qualifications of the electors and the elected.” *The Federalist* No. 52, at 266.

Regarding the voters, Madison explained (*ibid.* (emphasis added)):

Those [qualifications] of [those eligible to vote for Congress] are to be the same [as] those of the electors of the most numerous branch of the State Legislatures. The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. *It was incumbent on the Convention therefore to define and establish this right in the Constitution.* To have left it open to the occasional regulation of the Congress, would have been improper for the reason just mentioned. *To have submitted it to the legislative discretion of the States, would have been improper for the same reason;* and for the additional reason that it would have rendered too dependent on the State Governments, that branch of the Federal Government, which ought to be dependent on the people alone.

Madison and Hamilton therefore plainly had it in mind that *both* the qualifications for suffrage *and* for service in Congress were matters of fundamental importance that should be “fixed” by the law of the land, and that should not be subject to variation by “the legislative discretion of the States.”⁴

⁴ To be sure, the qualifications of voters, while fixed in the sense that they were tied to the qualifications for electors for the “most numerous branch” of the state legislature, need not be nationally uniform. Even as to this point, Madison observed that “because, being fixed by the State Constitutions, [the qualifications of voters are] not alterable by the State Governments, and it cannot be feared that the people of the States will alter this part of their Constitutions, in such a manner as to abridge the rights secured to them by the federal Government.” *The Federalist* No. 52, at 266. In any event, the

In fact, the Framers would have regarded as remarkable the suggestion that the States could determine eligibility for service in the national Congress, in particular the House of Representatives. While the anti-federalists were concerned that Congress might attempt to aggrandize power to itself, the federalists feared that the states might seek to undermine the federal government. It was for this reason that the Time, Place, and Manner Clause gives Congress the power to set aside the rules governing elections that are prescribed by the states.

As Hamilton explained in *The Federalist* No. 59, at 300:

Nothing can be more evident, than that an exclusive power of regulating elections for the National Government, in the hands of the State Legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs. It is to little purpose to say that a neglect or omission of this kind, would not be likely to take place. The constitutional possibility of the thing, without an equivalent for the risk, is an unanswerable objection.

Hamilton added that

with so effectual a weapon in their hands as the exclusive power for regulating elections for the National Government a combination of a few [ambitious] men, in a few of the most considerable states, where the temptation will always be the strongest, might accomplish the destruction of the Union, by seizing the opportunity of some casual

important point for present purposes is that Hamilton's statement about the "fixed" qualifications of members of Congress was meant to declare a universal principle.

dissatisfaction among the people (and which perhaps they may themselves have excited) to discontinue the choice of members for the federal House of Representatives.

Id. at 303.⁵ Permitting the states to determine the qualifications for service in Congress, of course, would raise precisely the same danger.⁶

4. It may be added that the Framers regarded the essential guarantee of democracy to be, not the authority of the states to determine who would serve in Congress, but "[f]requent elections." *The Federalist* No. 52, at 267. These Madison described as the "corner stone" of free government. *The Federalist* No. 53, at 271. Madison therefore explained in *The Federalist* No. 57, at 290-291 (emphasis added), that the various other practical considerations that should lead representatives to be loyal to their constituents

⁵ Hamilton recognized that some of the same dangers were raised by giving the state legislatures the authority to select senators. But he described this "as an evil, which could not have been avoided without excluding the States, in their political capacities, wholly from a place in the organization of the National Government." *The Federalist* No. 59, at 301. He added that "however wise it may have been, to have submitted in this instance to an inconvenience, for the attainment of a necessary advantage, or a greater good, no inference can be drawn from thence to favor an accumulation of the evil, where no necessity urges, nor any greater good invites." *Id.* at 302.

⁶ Petitioner USTL's attempt (Br. 42) to find support in *The Federalist* for the proposition that the states were not to be deprived of the power to regulate all aspects of federal elections is insubstantial. In *The Federalist* Nos. 44 and 59, cited by USTL, Madison plainly, and Hamilton expressly, were speaking only of the Time, Place, and Manner Clause, which explicitly confers a limited power on the states (itself displaceable by Congress) to regulate the procedural aspects of elections.

would be found very insufficient without the restraint of frequent elections. Hence, * * * the House of Representatives is so constituted as to support in the members an habitual recollection of their dependency on the people. Before the sentiments impressed on their minds by the mode of their elevation, can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there for ever to remain, *unless a faithful discharge of their trust shall have established their title to a renewal of it.*

On this view, the imposition of term limits by the states, which would remove the incentive for a “faithful discharge of their trust” from members of Congress, would be positively inimical to the theory on which representatives are to be kept responsive to the people. Hamilton made the same argument in defense of the Convention’s refusal to impose term limits on the President, explaining that such a restriction would cause “a diminution of the inducements to good behavior.” *The Federalist No. 72*, at 367.

It also bears some consideration that the Framers did not imagine that term limits would be imposed to preclude service in Congress — and plainly believed that lengthy service by at least some members was essential to the sound functioning of the Legislative Branch. Madison thus predicted that

A few of the members, as happens in all such assemblies, will possess superior talents, will by frequent re-elections, become members of long standing; will be thoroughly masters of the public business * * *. The greater the proportion of new members, and the less the information of the bulk of the members, the more apt they will be to fall into the snares that may be laid for them.

The Federalist No. 53, at 274. See *The Federalist No. 62*, at 316 (“[t]he mutability in the public councils, arising from a rapid succession of new members, however qualified they may be, points out in the strongest manner, the necessity of some stable institution in the government”). Again, Hamilton made the same argument regarding the omission of term limits for the President, explaining that continued service permitted the people “to prolong the utility of his talents and virtues, and to secure to the government, the advantage of permanency in a wise system of administration.” *The Federalist No. 72*, at 367.

C. Post-Ratification History

Finally, post-ratification developments confirm that the qualifications stated in the Constitution were understood to be exclusive. Respondents describe the reaction of the states to the ratification of the Constitution, and we will not repeat their arguments here. Instead, we focus on the 1807 case of William McCreery, in which *Congress* first addressed the question whether states could add to the constitutional qualifications. The McCreery episode was addressed at length in *Powell*, 395 U.S. at 542-543, where it was described as shedding considerable light on the intent of the Framers. See *id.* at 547 (“the precedential value of [congressional exclusion] cases tends to increase in proportion to their proximity to the Convention in 1787”).

McCreery’s case involved an 1802 Maryland law establishing an additional residency requirement; McCreery, an incumbent congressman who had been re-elected, was alleged to be ineligible for service because he did not satisfy that requirement. See *Powell*, 395 U.S. at 542.⁷ The House

⁷ The Maryland law created a district entitled to send two representatives to the House of Representatives, providing that one had to be a resident of Baltimore County and the other a resident of Baltimore City. McCreery lived in Baltimore City

Committee of Elections — chaired, as it happens, by Rep. William Findley, the notable anti-federalist who had opposed the Constitution (in part) because of its failure to permit term limits for members of Congress (see Eid & Kolbe, *supra*, at 33) — determined that the Maryland law could not be constitutionally applied because the qualifications stated in the Constitution are exclusive. Petitioner USTL (Br. 46 n.66) nevertheless dismisses the McCreery affair with the bald declaration that “the full House rejected the Committee’s report and declined to decide that the Maryland law was unconstitutional.” See also Ark. Br. 47. That assertion, however, does not begin to do justice to the episode.

In resolving that McCreery should be seated,

The committee [of Elections] proceeded to examine the Constitution, with relation to the case submitted to them, and find that qualifications of members are therein determined, without reserving any authority to the State Legislatures to change, add to, or diminish those qualifications * * * .

17 Annals of Cong. 871. Rep. Findley then explained that “[t]he Committee of Elections considered the qualifications of members to have been unalterably determined by the federal Convention, unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislatures are vested with the authority to

when first elected to Congress, but spent the summers at his farm in Baltimore County. It was alleged that McCreery, after his election to the House, spent the winters in Washington, D.C., and the summers in Baltimore County, ceasing to reside in Baltimore City at all. In the election at issue, the first-place finisher resided in Baltimore County; McCreery, who finished second, claimed the seat for Baltimore City. The third-place finisher, who lived in Baltimore City, argued that McCreery was ineligible to serve. See 17 Annals of Cong. 871 (1807).

add to those qualifications, so as to change them.” *Id.* at 872.

In expanding on why this is so, Rep. Findley added: The qualifications of the National Legislature are of a national character, and as such must be uniform throughout the nation, and prescribed by the authority of the nation, and by it exclusively; but no State Legislature is vested with national authority, they cannot make citizens for the nation, nor prescribe qualifications either for citizens or for Executive officers of the nation, much less can they prescribe qualifications for the National Legislature, other than the nation itself has prescribed, nor abridge the Constitutional power of Congress to decide on the qualifications of its own members, agreeably to the rules prescribed by the Constitution * * * .

It is a fundamental principle in a free government that the citizens should be protected in the enjoyment of all their natural rights * * *. It is the natural right of all men to choose whom they please, without regard to age, residence, etc., to represent and advocate their interests; but it is necessary for the protection of society that this right be abridged, but it ought to be no further abridged than is absolutely necessary for the safety of society * * *; and in the United States the society have decided on this principle by their general and ratifying conventions, and they have delegated no authority even to Congress, much less to States, to alter or add to or diminish these qualifications.

17 Annals of Cong. 873.

Those who defended the seating of Rep. McCreery advanced several principles. One was what should, by now,

be a familiar theory of democracy: “that there was a principle in a Republican Government, of as much importance as any other, as respected the safety of the Government, that the qualifications of the people elected should be firm, steady, and unalterable.” 17 Annals of Cong. 887 (Rep. Smilie). A second rested on policy: that “if the State Legislature had the right to prescribe in what part of the same district, and for what length of time, each of the Representatives should reside, they had also a right to prescribe in what street or what house of a street they must reside, and for what length of time.” *Id.* at 873 (Rep. Findley). And a third was the intent of the Framers: “when the framers of the Constitution undertook deliberately to enumerate the qualifications, it was presumable they meant that no others should be necessary.” *Id.* at 877 (Rep. Sturges).

As this background suggests, the participants in the McCreery debate understood that they were settling a matter of great constitutional importance, and they made frequent reference to *The Federalist* and other materials from the ratification period. See Eid & Kolbe, *supra*, at 34 n.176.⁸

⁸ It is notable that, when Rep. Key argued that the exclusivity of the qualifications stated in the Constitution “is explicitly stated and ably maintained” in *The Federalist* (17 Annals of Cong. 915), his opponents pointedly did not disagree. Instead, Rep. Randolph, leader of the forces arguing in favor of state authority, declared:

The gentleman from Maryland [Rep. Key] had cited as authority, what Mr. [Randolph] had not expected would ever have been produced in the House as such — commentaries on the Constitution made anterior to its going into operation. * * * These opinions had no weight with Mr. [Randolph]. He had not been in the habit of paying great deference to the political opinions of the late General Hamilton, or to those of the negotiator of the Treaty of London, nor did he think

And a very substantial majority of those who spoke agreed that the Maryland law could not be constitutionally applied. In addition to those already cited, see, e.g., 17 Annals of Cong. 886 (Rep. Clay) (“If the Legislature of the States had no Constitutional right to narrow the qualifications, they had no right to superadd to them”); *id.* at 890, 892 (Rep. Alston) (“any person possessed of qualifications, as required by the Constitution, and who was duly elected, was entitled to his seat, notwithstanding State regulations”); *id.* at 892, 893 (Rep. Rowan) (“the qualifications for a representative to Congress were unalterably fixed by the Convention; the Constitution was the place to look for them, and not the statute book, for if it were, they would float on popular caprice”); *id.* at 896, 897 (Rep. Johnson) (“la[ying] it down as a principle, that every contraction of qualifications for Representatives was an abridgment of the liberty of the citizen. The power of adding other qualifications than those fixed by the Constitution would * * * be a breach of the right of suffrage”); *id.* at 906, 908 (Rep. Quincy) (additional qualifications “a direct violation of the rights reserved to the people”); *id.* at 909, 910 (Rep. Key) (“there can exist no doubt but that all legislation is closed as to the qualifications of the elected or Representative”); *id.* at 917, 918 (Rep. Howard) (“the qualifications of members was a fundamental regulation fixed by the Constitution, and unalterable but by a change or amendment of the instrument itself”); *id.* at 927, 928 (Rep. Desha) (“These three [qualifications stated in the Constitution] are all the qualifications required”).

that the third member of the gentleman’s political trinity entitled to more consideration than his worthy co-adjudicators.

Id. at 944. Needless to say, Rep. Randolph’s views about Madison, Hamilton, and Jay have not survived the test of time.

To be sure, a "small but vocal group of dissenters," led by Rep. Randolph, argued that the states had the authority to add qualifications to those stated in the Constitution. Eid & Kolbe, *supra*, at 37. See 17 Annals of Cong. 880 (Rep. Sawyer); *id.* at 882, 942 (Rep. Randolph); *id.* at 889 (Rep. Bibb); *id.* at 898 (Rep. Love). This minority expressly recognized that they would be outvoted on the constitutional issue; Rep. Randolph declared bitterly that "he trusted at no far distant day, * * * the decision *about to be made in the case of Mr. McCreery* would be set aside, as a precedent taken from hard, unconstitutional times." 17 Annals of Cong. 942 (emphasis added). To avoid this outcome, Rep. Randolph tried to persuade the House to sidestep the constitutional issue by seating McCreery on the ground that he in fact "ha[d] the qualifications required by the law of Maryland." 17 Annals of Cong. 1234. This proposal, which would effectively have resolved the constitutional issue in favor of state authority, was defeated by a vote of 92-8. *Id.* at 1237. Eventually, however, the House, evidently exhausted by more than a month of debate, approved by a vote of 89-18 a resolution declaring simply "[t]hat William McCreery is entitled to his seat in this House." *Ibid.*

In this setting, the McCreery episode cannot be disregarded because the full House did not in terms adopt the conclusions of the Committee of Elections. "[G]iven the posture of the McCreery[] dispute, the Committee's report, and the substance of the ensuing debate on the House floor, the House's attempt to decide the case on non-constitutional grounds is unpersuasive since the vast majority of House Members had rejected a state's right to impose substantive qualifications on Congress." Eid & Kolbe, *supra*, at 38. The clear conclusion of the substantial majority of the House members to address the issue — in a debate conducted only 20 years after the Convention, and maintained in part by participants in the ratification process — must carry great weight. And those who spoke to the point understood what

the Framers plainly intended: that the qualifications for service in Congress stated in the Constitution are exclusive.

CONCLUSION

The decision of the Arkansas Supreme Court should be affirmed.

Respectfully submitted.

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